



Office of Audits
Office of Inspector General
U.S. General Services Administration

DATE: July 9, 2013

TO: GEORGE E. NORTHCROFT
REGIONAL ADMINISTRATOR
NORTHWEST/ARCTIC REGION (10A)

FROM: ADAM R. GOOCH 
REGIONAL INSPECTOR GENERAL FOR AUDITING
GREAT LAKES REGION (JA-5)

SUBJECT: Incorporation of Foreign-Made Construction Materials into the
Richland, Washington Federal Building, U.S. Post Office, and U.S.
Courthouse Violated Recovery Act Requirements
Audit Memorandum Number A090184-55

As part of our oversight of the General Services Administration's American Recovery and Reinvestment Act (Recovery Act)¹ projects, we identified an issue that warrants your attention. During our review, we determined that the contractor incorporated foreign-made construction materials into the Richland, Washington Federal Building, U.S. Post Office, and U.S. Courthouse Recovery Act project in violation of the Recovery Act. However, the Public Buildings Service (PBS) did not incorporate clauses mandating adherence to the Buy American provisions of the Recovery Act into the base contract until after the materials were delivered. As a result, PBS considered itself potentially liable for the cost of replacing the foreign-made materials with American-made products. PBS attempted to mitigate the issue by directing the contractor to "substantially transform" the materials in order to comply with the Recovery Act requirements. These efforts did not make the foreign-made construction materials compliant and, therefore, the matter remains a violation.

Background. GSA awarded a task order against indefinite delivery indefinite quantity (IDIQ) Contract Number GS-10P-08-LT-D-0100 to Randolph Construction Services, Inc. (Randolph Construction) for energy efficiency upgrades, including boiler repair, steam

¹ The American Recovery and Reinvestment Act of 2009 provided the General Services Administration (GSA) with \$5.55 billion for the Federal Buildings Fund. In accordance with the Recovery Act, PBS is using the funds to convert federal buildings into High-Performance Green Buildings, as well as to construct federal buildings, courthouses, and land ports of entry. The Recovery Act mandated that \$5 billion of the funds be obligated by September 30, 2010, and the remaining funds be obligated by September 30, 2011. The GSA Office of Inspector General is conducting oversight of projects funded by the Recovery Act. One objective of this oversight is to determine if PBS is awarding and administering contracts for limited scope and small construction and modernization projects in accordance with prescribed criteria and Recovery Act mandates.

coils, and cooling towers. The work was performed at the Richland Federal Building in Richland, Washington. The task order, dated June 30, 2010, was valued at about \$955,000. Work at the building was substantially completed in August 2011.

The burners for the project were foreign-made. Randolph Construction supplied three replacement burners to improve boiler combustion efficiency, as required by the statement of work. The burners, valued at over \$350,000, were manufactured in Germany by a company named Max Weishaupt GmbH (Weishaupt) and delivered to the Richland facility in January 2011. Based on a packing list and shipping label, PBS officials believed the burners were not manufactured in the United States.² At that time, the contracting officer determined that the equipment represented foreign-manufactured construction material and was not in compliance with the Buy American provisions of the Recovery Act.

PBS attempted to have the foreign-made burners substantially transformed. PBS was concerned about the costs associated with replacing the foreign-made burners with American-made items in order to meet the updated contract specifications. At the time the burners were delivered to Richland, PBS had not modified Randolph Construction's governing IDIQ contract with the contract clauses implementing section 1605 of the Recovery Act. Federal Acquisition Regulation (FAR) 52.225-21 (Required Use of American Iron, Steel, and Manufactured Goods – Buy American Act – Construction Materials) implements section 1605 by requiring, unless an exception applies, that all manufactured construction material be manufactured in the United States. The clause was not inserted into Randolph Construction's contract until July 1, 2011; almost 2 months after the contracting officer accepted the German-made products. Regional officials concluded that this left them open to paying for the removal and replacement of the burners.

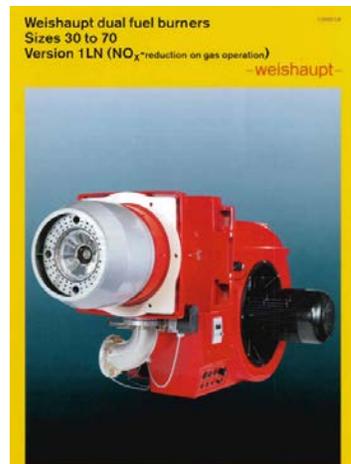


Figure 1 - Picture of Weishaupt burner

PBS determined that substantial transformation of the burners was the most effective means to bring the foreign-manufactured equipment into compliance with the modified contract clauses. Substantial transformation, as defined in FAR 25.001(c)(2), means that, for trade agreements, a product is considered to have been manufactured in the United States if it has been transformed in the United States "into a new and different article of commerce, with a name, character, or use distinct from the original article." Although Weishaupt stated that any work to be done on the burners could be performed at the Richland site, PBS allowed the prime contractor to ship the yet-to-be installed burners to Weishaupt's facility in Elgin, Illinois for substantial transformation.³

² We determined that all Weishaupt burners are manufactured in Germany and the subject units were shipped from Weishaupt's Mississauga, Ontario, facility.

³ Weishaupt's substantial transformation consisted of working on peripheral equipment (control panel and gas train), altering the burners to meet U.S. requirements, wiring, testing, and labeling.

The current PBS contracting officer stated that the foreign-manufactured equipment, with the proposed transformation, was in compliance with the Buy American Act.⁴ The equipment was finally installed around August 3, 2011, 6 months after the original delivery to Richland.

The foreign-made burners still violate Recovery Act requirements since substantial transformation was not a viable option. The current contracting officer's determination that the foreign-made burners could become compliant through substantial transformation was incorrect. Substantial transformation is addressed in the FAR only in the context of trade agreement implementation and does not apply to the Richland task order. Therefore, the burners installed at the Richland Federal Building remain foreign-made and PBS is in violation of the Recovery Act provision that

None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

In its comments, Region 10 PBS concurred with the report's findings. However, PBS officials state that the Contracting Officer's actions at the time were a reasonable exercise of policy discretion, considering that the Contracting Officer sought advice from the Regional Counsel, Regional Procurement Officer, and technical personnel.

We concur that the contracting officer took reasonable steps by seeking advice on the issue. However, the advice obtained was not in keeping with the requirements of the Recovery Act. Further, the Recovery Act did not provide policy discretion on implementing its requirements.

If you have any questions regarding this memorandum, please contact me or any member of my audit team at the following:

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I would like to thank you and your staff for your assistance during this review.

⁴ The project's original contracting officer, who determined that the burners were foreign manufactured material, left GSA around April 2011. The current contracting officer made the determination that substantial transformation would make the installation of the burners compliant. See letter to Randolph Construction, May 6, 2011.

Distribution

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